No. 109

In the Supreme Court of the United States

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, PETITIONER

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103–105) is reported at 166 F. 2d 796.

JURISDICTION

The order of the Court of Appeals was entered on May 12, 1948 (R. 109–112). The petition for a writ of certiorari was filed on June 21, 1948, and granted on October 11, 1948 (R. 118). The jurisdiction of this Court rests upon 28 U. S. C. 1254.

QUESTIONS PRESENTED

Pending judicial review of an order of the Federal Power Commission under the Natural Gas Act, directing Interstate Natural Gas Company, Incorporated, to reduce its wholesale interstate rates for natural gas, there accumulated, pursuant to a stay order issued by the court below, a sum of $2,765,205, representing the difference between the rates prescribed by the Commission and the rates collected by Interstate under the stay order. After the Commission's order was sustained by this Court in *Interstate Natural Gas Company* v. *Federal Power Commission,* 331 U. S. 682, Interstate moved in the court below for an order directing the distribution of the accumulated fund. The court below considered itself compelled by this Court's decision in *Central States Co.* v. *City of Muscatine,* 324 U. S. 138, to direct the distribution of the fund to the immediate purchasers from Interstate, who were themselves "natural-gas companies," as defined by the Natural Gas Act, and thus subject exclusively to the jurisdiction of the Commission in respect of their wholesale sales. Their rates, in turn, during the impoundment period, had been found by the Commission to have been excessive without regard to the lower costs which would result from the Interstate reduction and, during or immediately prior to the impoundment period, had been ordered reduced to reasonable levels. The questions presented are:

(1) Whether the *Central States* case should be reexamined and disapproved. And, if not,

(2) Whether, on the facts of the instant case, the *Central States* case compels the distribution of the accumulated fund to Interstate's immediate purchasers.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. 717 *et seq.*) are set forth in the Appendix, *infra*, pp. 63-66.

STATEMENT

The Federal Power Commission (Commission) on April 27, 1943, ordered Interstate Natural Gas Company (Interstate) to reduce its rates on and after May 15, 1943, by $1,100,345 per annum as applied to its 1941 volume of sales. 3 F. P. C. 416, 432, 434–435. The Commission, on June 9, 1943, denied Interstate's petition for rehearing which Interstate had filed on May 13, 1943. 3 F. P. C. 1017.[1] On June 14, 1943, Interstate filed, in the Court of Appeals for the Fifth Circuit, a petition for review of so much of the Commission's order as pertained to its rates for resale to Mississippi River Fuel Corporation (Mississippi), Southern Natural Gas Company (Southern Natural), and United Gas Pipe Line Com-

[1] The Commission modified its order to reduce the amount of the rate reduction by $8,762 to $1,091,583, and postponed the effective date to June 15, 1943.

pany (United Gas) for sale to Memphis Natural Gas Company (Memphis), which the Commission had found to be excessive in the amount of $596,320 per year.[2] The petition for review was thereafter denied by the Court of Appeals, Judge Waller dissenting (*Interstate Natural Gas Co. v. Federal Power Commission*, 156 F. 2d 949), and this Court, on June 16, 1947, affirmed. 331 U. S. 682. Interstate's petition for rehearing was denied on October 13, 1947. 332 U. S. 785. The reduced rates were put into effect commencing with deliveries for the month of October, 1947.

Ancillary to its petition for review in the Court of Appeals, Interstate prayed the court to stay the operation of the rate reduction order pending review thereof, upon such terms and conditions as might be prescribed by the court. On June 14, 1943, the stay was granted on the condition that Interstate pay into the court's registry the monthly excess of payments under the existing rates over those required under the Commission's order (R. 1, 2). It further provided (R. 2):

> The amounts so deposited shall remain on deposit subject, however, to the further Order or Orders of this Court to be returned to such ultimate consumers of gas, or other persons to whom the Court shall

[2] By stipulation, Interstate withdrew its assignments of error in so far as they related to the remaining portion of the Commission's rate order.

find the same should be returned, as contemplated by the provisions of the Natural Gas Act.

* * * * * *

Full power and jurisdiction is reserved to cancel or modify this Order and to enter any other orders (with or without application of the parties) to protect or to promote the rights and interests of the parties to this litigation and of the ultimate consumers or other parties financially interested in the impounded funds.

Pursuant to this Order, Interstate deposited $2,444,573 in the registry of the court. Some $320,000 more, not paid into the court's registry, is admitted by Interstate to be due under the terms of the stay (R. 43, 52, 75).

On December 18, 1947, subsequent to this Court's denial of rehearing in regard to the main review proceeding, Interstate moved the court below for an order distributing the impounded fund to its four immediate purchasers, Mississippi, Southern Natural, United Gas for sale to Memphis, and Memphis (R. 16–19).[3] All four companies thereupon moved to intervene in the proceedings (R. 42–48, 49–54, 71–81, 100–103), and intervention was allowed (R. 67). United

[3] The sales of natural gas to United Gas involved in that portion of the Commission's Order which was reviewed covered the period from June 1, 1943 to December 10, 1945, and were for resale to Memhpis (R. 43). Thereafter, pursuant to a contract between Interstate and Memphis, Memphis made its purchases directly from Interstate.

Gas claimed an allocable share on behalf of Memphis to which it had resold the gas which it had purchased from Interstate (R. 100). The other three purchasers, Mississippi, Southern Natural, and Memphis, claimed their allocable share for themselves and urged, in reliance on *Central States Co.* v. *City of Muscatine*, 324 U. S. 138,[1] that the court had no choice but to distribute the fund to them. These companies, in turn, resold gas to twenty-one distributing companies which served ultimate consumers in eight states (Georgia, Alabama, Mississippi, Louisiana, Tennessee, Arkansas, Missouri and Illinois).[2]

The Illinois Commerce Commission (petitioner in No. 212), the Public Service Commission of Missouri (petitioner in No. 188), the Memphis Light, Gas and Water Division of the City of Memphis, (petitioner in No. 209), and the City of Jackson, Tennessee, also intervened (R. 68–71, 92–95, 21–41, 81–87). They, together with the Commission, urged, in opposition to the claims of the purchasing companies, that the *Central States* case was not here applicable inasmuch as the

[1] The purchasing companies also relied on the unreported *per curiam* opinion of the Court of Appeals for the Eighth Circuit in *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission*, ordering distribution of allocable shares to Panhandle's nondisclaiming customers. The Eighth Circuit there based its opinion on the *Central States* case.

[2] The details of the amount of gas sold to distributing companies, and the amount of refund to which each would be entitled if the impounded fund were passed on to them is set forth in the Record at p. 30.

claiming companies were "natural-gas companies" whose rates for transportation or sale at wholesale of natural gas in interstate commerce were not subject to local regulation. The Commission further pointed out that voluntary rate reductions and Commission rate reduction orders during the impoundment period showed that these companies were earning not less than a reasonable rate of return on their interstate business without the benefit of the impounded excess. The Commission took the position that the impounded fund belonged to, and should be distributed to, the ultimate consumers, and that notice should be given to interested persons including, among others, the state regulatory commissions and cities in which are located the ultimate consumers. This the court failed to do (R. 58).

The court below held, citing only the *Central States* case, that "whatever may be the rights of ultimate consumers or others to require the pipeline companies who have overpaid Interstate to account to them in respect to such overpayments, it is not our function to search out or declare them. The only appropriate order for this court to enter is one requiring Interstate to repay to the three pipeline companies the moneys which Interstate wrongfully exacted from them under the protection of our order, such distribution to the three pipeline companies, however, to be without prejudice to the rights, if any, of ultimate consumers or others to hold

said companies to account in respect thereof" (R. 105). The court, accordingly, entered an order directing that the fund be distributed to Interstate's immediate purchasers in accordance with the terms of its opinion (R. 109–112).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the *Central States* case is here applicable.

2. In holding that it was required, as a matter of law, to order the distribution of the fund accumulated under its stay order to immediate purchasers of natural gas from Interstate.

3. In ordering the distribution of that fund to these purchasers.

SUMMARY OF ARGUMENT

In this case, the court below held that it was compelled by *Central States Co.* v. *City of Muscatine,* 324 U. S. 138, to distribute to the immediate purchasers from Interstate, themselves "natural-gas companies," the fund accumulated pursuant to its stay of a Commission rate reduction order. In the *Central States* case, this Court held that courts of appeals were without power to distribute such a fund to ultimate consumers where a local distributing company claimed its allocable portion on the ground that it had failed to earn a reasonable return during the impoundment period. The determination of that claim, this Court held, involved the legisla-

tive function of rate-making, solely within the competence of Iowa, the state where the local distributing company was located. We show first that the *Central States* case should be reexamined and overruled, and second, that even if Central States is to stand, the immediate purchasers from Interstate are not entitled to the fund, even within the confines of that case. We are constrained primarily to contend, however, that *Central States* should be overruled; for, although it is, in some respects, distinguishable, the effect of the distinctions advanced can only bring to the ultimate consumers those portions of the fund the rights in which are voluntarily disclaimed by distributing companies who purchase for resale from the respondent immediate purchasers.

I

A. The *Central States* case is unsound on principle. Since the fund to be distributed was accumulated as the result of a judicial stay, the court has, as an incident thereto, the power to dispose of the fund, so accumulated, in accordance with equitable principles. The fund need not be distributed solely to the immediate purchasers; all interests in the fund, including claims over which the court would have had no original jurisdiction, may be passed upon.

Of the possible claimants to such a fund, the ultimate consumers are the only group who were prejudiced by the stay and, since the criterion

governing distribution of the fund is correction of wrong caused by the stay, the ultimate consumers are equitably entitled to the fund. The "natural-gas company" whose rates were reduced received affirmative protection from the stay. The purchasers for resale were not affected by the stay; it did not disable them from invoking the usual machinery for seeking rate increases if they failed to earn a reasonable return. The stay did, however, prevent the transmission of the benefits of the Commission's order to the ultimate consumers. While the stay was in effect, no voluntary reduction in rates based on the reduced costs that would follow upon the affirmance of the rate reduction order would be made, nor could that order be used by the ultimate consumers and the regulatory commissions to attack the rates of the purchasers for resale. The equitable right of the consumers is reinforced by the fact that the primary purpose of the Natural Gas Act is to protect them against exploitation.

Approached as a problem in judicial disposition of a fund accumulated pursuant to court order, there is no question as to the reasonableness of the rates of the purchasers for resale and hence no rate-making question. This is so because as we have said, it is fair to presume that purchasers for resale were not injured by the stay. However, even if the reasonableness of its rates were a factor in determining whether a purchaser for resale might share in the distribution, that ques-

tion would not involve the legislative function of rate making. The reasonableness of the rates is only one of the factors considered in passing on the claim. The rates prescribed by, or filed with, the appropriate agency are not changed or affected and remain the legal rates. To the extent that elements of rate making are considered, the court may utilize advisory determinations of the regulatory agencies and, in the light of these determinations, it may dispose of the fund in accordance with equitable principles. Such cooperation between the courts and regulatory agencies "was devised to unravel the skein," in *United States* v. *Morgan*, 307 U. S. 183, and *Atlantic Coast Line Co.* v. *Florida*, 295 U. S. 301. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620.

B. The *Central States* case defeats the objectives of the Natural Gas Act for the period of judicial review by nullifying for that period its financial benefits to the ultimate consumers. For example, in the present case, none of the fund will reach the ultimate consumers, and the immediate purchasers, who earned a reasonable return during the impoundment period and who are in a position to retain their full share, receive a pure windfall. Prior to *Central States*, it was uniformly agreed that the ultimate consumers were entitled to the impounded fund. In contrast, subsequent to that decision, substantial numbers of immediate purchasers have asserted claims. This increase is largely due to the fact that once a purchaser for resale has received its

allocable share, it usually is in a position to keep it, for, despite this Court's express preservation of local remedies to the ultimate consumers, typically, no such remedies are available either before the regulatory commissions or the courts. Moreover, by requiring the contribution of such a windfall to the purchasers for resale, the *Central States* case encourages frivolous litigation, where, as was the situation here, there is affiliation between the "natural-gas company" whose rates have been ordered reduced and its immediate purchaser, a situation not uncommon in the natural gas industry.

C. This Court should itself overrule *Central States*. Corrective action, if any is to be had, should not be left to Congress, for the *Central States* opinion is formulated in constitutional terms of exclusive state legislative power. Moreover, questions relating to the powers of a federal court sitting as a court of equity are singularly judicial, not legislative, in nature. Congress has not affirmatively approved the decision, but, rather, has been silent. No interests, substantial or otherwise, have been established by "the accretion of time and the response of affairs" around the decision.

II

Even if *Central States* should not be disapproved, the present case is distinguishable from that case in at least three significant respects, and

hence, even within the confines of that case, Interstate's immediate purchasers are not entitled to the fund.

A. Here, unlike the situation before this Court in *Central States*, the immediate purchasers are themselves "natural-gas companies" engaged in the transportation or sale at wholesale of natural gas in interstate commerce. These activities are subject to regulation only by the Commission, and even in the absence of Congressional action, are not subject to local regulation.

B. Here, the claims of the immediate purchasers, unlike those involved in the *Central States* case, are predicated not on the ground that their return during the impoundment period was unreasonably low, but, rather, solely on the ground that they are the immediate purchasers from Interstate. And even if the immediate purchasers had based their claim on an inadequate return, there was available to the court, in contrast to the *Central States* situation, the findings of the Commission which, immediately before the issuance of the Interstate rate order and while it was suspended during judicial review, had investigated into the reasonableness of the immediate purchasers' wholesale interstate rates. Although no effect was given to the Interstate rate order, the immediate purchasers' rates were found unreasonably high, and were substantially reduced, either voluntarily or pursuant to Commission order, to reasonable levels. Whatever legislative

function there might be involved in passing on the reasonableness of the immediate purchasers' rates has already been performed by the Commission, and hence there were available to the Court administrative findings as to the reasonableness of these rates for its use in passing on the immediate purchasers' claims.

C. In *Central States;* this Court did not consider that it was finally disposing of the fund. Here, however, there is plainly no other forum in which the claim of the immediate purchasers to the fund may be challenged. The Commission has no reparation power. The state regulatory agencies have no power to compel the immediate purchasers to disgorge that portion of the refund attributable to their wholesale interstate sales. Hence, the distribution of the fund to the immediate purchasers here is final.

D. An additional factual distinction, which may be given some weight, is the terms of the stay orders. In *Central States,* the stay provided for the filing of a bond to secure the refund to the purchasers at wholesale. Here, the stay recognized that the ultimate consumers had a fundamental claim in the impounded fund and the court, when it granted the stay, apparently intended to distribute the fund to the ultimate consumers, barring unforeseen contingencies.

ARGUMENT

INTRODUCTION

This case raises the problem of the disposition of a fund which has accumulated as a result of the exercise of the equitable power of a court of appeals, under Section 19 (c) of the Natural Gas Act (Appendix, *infra*, p. 66) to stay the Commission's order pending review. Now, that judicial review has been concluded and the Commission's order sustained, the question as to the appropriate manner of distributing the fund which represents the difference between the rates charged by Interstate and the lower rates ordered by the Commission calls for decision.

In *Central States Co.* v. *City of Muscatine*, 324 U. S. 138, this Court denied to the court of appeals there involved the power to distribute to the ultimate consumers the fund which had accumulated pursuant to the court's stay, there being an adverse claim thereto, asserted by a local distributing company, and predicated on the ground that it had failed to earn a reasonable return during the impoundment period. As formulated by Mr. Justice Roberts writing for the majority, the issue before the Court for decision involved the fixing or adjusting of Central's rates. (324 U. S. at 143.) As so formulated, the Court commented, "the court below was right in its view that as a federal court it had no power * * * to fix or adjust Central's

rates, that being a legislative function of the State of Iowa. * * * This, because the court below had no power as a court of equity to fix rates, and as a federal court had no power to adjudicate a matter within the legislative competence of Iowa." (324 U. S. at 143–144.)

In the present case, the immediate purchasers from Interstate, themselves "natural-gas companies" which sell to local distributing companies for resale to ultimate consumers, claimed the fund solely on the basis of the fact that they were the immediate purchasers. The court below held, on the authority of the *Central States* case, that it was without authority to inquire into those claims, and that the only appropriate manner of distribution was to give the fund to the claiming immediate purchasers without prejudice to the rights of the ultimate consumers or others to hold them to account in respect thereof (R. 105).

In Point I, we show that inquiry into the claim of the purchasers for resale, whether local distributing companies or "natural-gas companies," indicates that the fund should be awarded to the ultimate consumer if equity is to be done and the Congressional purpose is to be realized; accordingly we urge the Court to reexamine and overrule the *Central States'* decision, so as to make an award of the fund to the ultimate consumers possible. We urge, in Point II, that, consistently with the *Central States'* decision, the

court below could have inquired into and rejected the immediate purchasers' claims, with the result that, since some local distributing companies have disclaimed and more probably would, some part of the fund would reach the ultimate consumers.

I

THE *Central States* CASE SHOULD BE REEXAMINED AND OVERRULED

A. A FEDERAL COURT HAS JURISDICTION TO DISTRIBUTE IMPOUNDED FUNDS TO ULTIMATE CONSUMERS, AS AGAINST THE CLAIM OF PURCHASERS FOR RESALE

1. *A federal court has equitable jurisdiction to distribute the fund.*—The fund to be distributed in the *Central States* case, as is the case of the fund here involved, was accumulated as the result of a stay order issued by a court of appeals pending judicial review of a Commission rate reduction order. In each case, the Commission had issued an order directing a "natural-gas company" to reduce its rates subject to the Commission's jurisdiction by a prescribed amount, and the "natural-gas company" sought judicial review of the Commission order, as provided in Section 19 (b) of the Natural Gas Act (Appendix, *infra*, pp. 64–65). As an incident to that review, the company also requested the court to exercise the power vested in it by Section 19 (c) of the Natural Gas Act to stay the Commission's order (Appendix, *infra*, p. 66), and thereby to assure

the company that the excess over the rates ordered by the Commission would not be dissipated in the event that the Commission's order be set aside. As a consequence of the exercise of jurisdiction to stay the Commission's order, a court of appeals also, we submit, had the jurisdiction to distribute, in accordance with equitable principles, the fund which accumulated pursuant to its stay.

At the outset, it is clear that a court of appeals sits as a court of equity in reviewing the action of the Commission. *United States* v. *Morgan*, 307 U. S. 183, 191; *Inland Steel Co.* v. *United States*, 306 U. S. 153; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373. When, as a court of equity, it grants injunctive relief, the court has the duty "to do so upon conditions that will protect all—including the public—whose interests, the injunction may affect." *Inland Steel Co.* v. *United States, supra* at 157. As specifically here applied, this means that "in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive [the court] assumes the duty of making disposition of the fund in conformity to equitable principles." *United States* v. *Morgan, supra* at 191; *Inland Steel Co.* v. *United States, supra.*

In disposing of the fund, the court need not consider solely the claims of those persons who

are parties to the proceedings. On the contrary, the court has authority to determine all interests in the fund and order the distribution thereof to those who are equitably entitled thereto. *United States* v. *Morgan, supra* at 187. This broad jurisdiction stems from the fact that the fund was accumulated as an incident to the main review proceedings. *Hoffman* v. *McClelland,* 264 U. S. 552; *Inland Steel Co.* v. *United States, supra,* at 158. And in the ancillary proceedings regarding the disposition of the fund, the court has power to consider not only claims which it would have power to adjudicate in an original proceeding but also claims over which the court had no original jurisdiction. "Where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs * * * *." *Hoffman* v. *McClelland,* 264 U. S. 552, 558; see also, *Central Union Trust Co.* v. *Anderson County,* 268 U. S. 93; *Oklahoma* v. *Texas,* 258 U. S. 574, 581; *Labette County Commissioners* v. *Moulton,* 112 U. S. 217; *Krippendorf* v. *Hyde,*

110 U. S. 276, 281; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 632.*

Ex parte Lincoln Gas & Electric Co., 256 U. S. 512, is particularly relevant on this question. In that case, the district court, after this Court had sustained a municipal gas ordinance (250 U. S. 256), retained jurisdiction to require the company to make refund and restitution to consumers of all amounts collected over the legal rate while the litigation was pending. This Court there rejected as transparently unsound the contention that since the consumers were not parties to the record nor in privity with the parties, the court was without jurisdiction to distribute the money to them. 256 U. S. at 517. It further pointed out that the bond there filed by the Company "rec-

* *Southern Pacific Co.* v. *Darrell-Taenzer Lumber Co.*, 245 U. S. 531, and *Adams* v. *Mills*, 286 U. S. 397, relied on by respondent Southern Natural (Answer in No. 109, p. 10) are clearly inapplicable here. Those cases involved reparation proceedings where the issue concerned the liability *vel non* of the utility to refund excessive rates previously collected. In such a situation, the strict rules of contractual privity are held to be controlling, and hence the utility was not permitted to evade the obligation to refund by asserting that the party seeking reparation may have passed on the excessive charges to someone else. Strict contractual privity is, however, not controlling in situations such as the instant one, where the court proceeds on equitable principles. See *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 402–403. In such a case, the court is less restricted and fettered by technical rules and formalities than in other types of actions. "It aims at the abstract justice of the case * * *." *United States* v. *Jefferson Electric Co.*, *supra* at 403.

ognized that to ascertain what should be due to them [the ultimate consumers], to see to its collection from the company in case of its failure to make good its attack upon the ordinance, and to cause distribution to be made among the several claimants, was essential to the doing of complete equity, and therefore a natural incident to the jurisdiction of the court in the main cause. To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate." 256 U. S. at 517. See, also, *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 146; *In re City of Louisville*, 231 U. S. 639; *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 483 (C. C. A. 7).

2. *The ultimate consumers are equitably entitled to receive the impounded fund.*—An equity court, in distributing the fund accumulated by virtue of its stay, seeks "to correct that which has been wrongfully done by virtue of its process." *United States* v. *Morgan*, 307 U. S. 183, 197; *B. & O. R. Co.* v. *United States*, 279 U. S. 781, 786; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry Co.* 249 U. S. 134, 146; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219; *Central States* case at 148 (dissenting opinion); cf. *First National Bank* v. *Flershem*, 290 U. S. 504, 520. In the light of that objective, the determination as to which among the conflicting

interests should participate in the distribution of the fund involves ascertaining who suffered a loss as a result of the court's action in granting the stay. Examination of the bases of claims of the various groups of possible claimants to the impounded fund indicates clearly that the ultimate consumers are the only persons prejudiced because of the stay.

The "natural-gas company" whose rates the Commission has ordered reduced, far from being injured by the stay, receives affirmative protection therefrom. If it is successful in reversing the Commission's order, the stay assures it that it will receive 100% of the excess over the rates ordered by the Commission. If it does not succeed in reversing the Commission's order, it is in no worse position than if the order had not been stayed.

The purchasers for resale of the natural gas, whether local distributing companies as in the *Central States* case, or "natural-gas companies" as in the present case, suffer no monetary loss as a result of the stay. The costs of the purchased gas are included in rates charged to the ultimate consumers and so passed on to them. In addition, these companies are constitutionally entitled to charge rates which reimburse them for their costs of operation and in addition yield a fair return on their investment. Included in these costs of operation is the cost of purchased gas, which, with the Commission's rate order stayed, re-

mains unchanged during the impoundment period. If on the basis of costs so computed, the purchasers for resale fail to earn a fair return, the usual machinery for seeking an appropriate rate increase is available to them; the court's stay does not in any way disable them from invoking that machinery. Presumptively, their failure to seek such a rate increase indicates that in fact they did earn a fair return. *Central States* case at 150, 153 (dissenting opinions); cf. *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U. S. 291, 312. Moreover, even if they did not earn a fair return during the period that the Commission's order is stayed, that failure is not a consequence of the stay. It is only those consequences which resulted from the stay which the court should correct in distributing the impounded fund. To bestow upon the purchasers for resale the fund accumulated pursuant to the stay in addition to the fair return which they are entitled to seek by other means would be to give them an unmerited windfall.[7]

The ultimate consumers, however, do suffer a monetary loss as a result of the stay of a Commission rate reduction order. During the period

[7] It was for this reason that the natural gas company in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (which gave rise to the *Central States* case) urged initially that, as between it and the companies purchasing from it, it was entitled to the fund which had accumulated. See Brief for Natural Gas Pipeline Co., Nos. 265, 268, October Term 1941, pp. 260-264.

that the order is stayed, no voluntary reduction in rates predicated on reduced cost stemming from the rate reduction order would be made. Until the rate reduction is finally affirmed by the courts, it is uncertain whether the distributing company's costs of purchased gas will be so reduced. For that reason, neither the state regulatory agency nor the ultimate consumers themselves can, in reliance on the Commission's rate reduction order, attack the local distribution rates as unreasonably high. "A federal rate reduction order cannot be utilized before state regulatory agencies where the federal order has been stayed by a federal court. Thus, during the three years that the Power Commission's rate reduction was held in abeyance pursuant to the stay orders, the Iowa consumers were deprived of the opportunity to obtain a reduction of their rates from the local regulatory agencies." *Central States* case at 149 (dissenting opinion). Accordingly, since the court, in staying the Commission's order, prevented the transmission of these benefits to the ultimate consumers, it should, on the equitable principle of correcting that which had been wrongfully done by its process, order the distribution of the fund to the ultimate consumers.[8]

[8] The fact that, absent a stay, delays, inherent in the processes of law, might have been encountered in reducing the rates of the purchasers for resale, does not affect the equitable right of the ultimate consumers to the fund where the order has been stayed. "If the processes of the law * * * [were] instantaneous or adequate, the attempt at correction

This is particularly true where, as here, the ultimate consumers have no legal recourse for the recovery of any part of the impounded funds. See *infra*, pp. 39–41, 59–61.

This equitable right to the impounded fund of ultimate consumers as the only persons who suffered monetary loss by virtue of the stay, is reinforced by the fact, which this Court has recognized, that "the primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612;[9] see, also, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 583; *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456, 469; *Central States* case at 146 (dissenting opinion). The distribution of the impounded fund to the ultimate consumers would be in furtherance of this objective.

3. *The judicial distribution of the impounded fund does not involve rate making.*—(a) As we have shown above, only the ultimate consumers have suffered loss as a result of the stay and have an equitable right to the impounded fund. The purchasers of natural gas for resale, whether local distributing companies or "natural-gas com-

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would not have missed the mark." *Atlantic Coast Line Co.* v. *Florida*, 295 U. S. 301, 312.

[9] Mr. Justice Jackson's separate opinion in that case contains the statement that "the whole reduction" in the natural gas company's revenues "is owing to domestic users." 320 U. S. at 659.

panies," have no equitable right to the fund. They are not restrained by the stay from seeking adjustments of their rates to yield a fair return and, hence, presumptively earned a fair return during the impoundment period. *Supra,* pp. 22–23. When the problem of distributing the impounded fund is thus properly approached, no rate-making question is raised and the equity court intrudes upon no state legislative function.

(b) Only if we assume, *arguendo,* that a purchaser for resale sustains the burden of making at least a *prima facie* showing that it had not earned a reasonable return during the impoundment period and ignore such a purchaser's failure to appeal to the appropriate regulatory agency for an increase in rates, is the reasonableness of its rates during that period a factor in determining whether it is entitled to share in the distribution. But, even then, it does not follow that the determination of that question is beyond the competence of the court. In such a proceeding, the court would be seeking to correct the wrong allegedly resulting from its stay of the Commission's order, and the question before the court would be which of the claimants were equitably entitled to share in the accumulated fund. *Supra,* pp. 19, 21–22. The question as to the reasonableness of the rates is ancillary thereto, and is one of the factors considered in passing on the claim of a claiming purchaser for resale. Moreover, the determination is made only for the purpose of

the distribution proceeding, and does not in any way affect the rates charged during the impoundment period. These rates are those prescribed by or filed with the appropriate agency and, regardless of the determination in the distribution proceeding, remain the legal rates for that period. The claimant company has received those rates, and if the fund is distributed to the ultimate consumers, will continue to retain them. It merely will not get the extra windfall which the order of the court below would give it. In these circumstances, any inquiry by a federal court as to the reasonableness of the company's past rates for the purpose of remedying the injury caused by its action cannot, we submit, be said to involve legislative prescription of rates.[19] *Atlantic Coast Line Co.* v. *Florida*, 295 U. S. 301;

[19] Traditionally, the scope of the exclusively legislative function in regard to rates is restricted to the prescription of future rates. The inquiry into the reasonableness of even future rates legislatively prescribed, although limited to determine whether any constitutional or statutory rights have been violated, has been regarded as judicial in nature. See, *e. g.*, *Los Angeles Gas Co.* v. *R. R. Comm'n.*, 289 U. S. 287; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; compare *Keller* v. *Potomac Electric Co.*, 261 U. S. 428. The judicial nature of the inquiry is even clearer when the question of reasonableness relates to past rates. *Interstate Commerce Commission* v. *Railway Co.*, 167 U. S. 479, 499–500, and cases there cited; *Baer Bros* v. *Denver & R. G. R. R. Co.*, 233 U. S. 479, 486; *L. & N. R. R. Co.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 234; *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370.

Inland Steel Co. v. *United States*, 306 U. S. 153; *United States* v. *Morgan*, 307 U. S. 183; *Central States* case, 324 U. S. at 149 (dissenting opinion). In both the *Morgan* and *Atlantic Coast Line* cases, the courts themselves ordered the distribution of the fund accumulated during a period of judicial review of a rate order, although the claims there presented involved a determination as to reasonable rates during that period.

To the extent that such an adjudication involves rate making, this Court has held that the equity court could utilize administrative determinations of the proper rate for the interim period although such rates were beyond the competence of the administrative agency to prescribe. Thus, in the *Morgan* case, the fund involved had accumulated under a judicial stay in effect while the original rate reduction order issued by the Secretary of Agriculture was being reviewed and set aside by the courts for procedural defects. Any order which might subsequently be issued by the Secretary would necessarily be effective only prospectively, for there was no statutory provision for reparations. This would leave the prescribing of proper rates for the period of the impoundment beyond the competence of the Secretary. But this Court pointed out that the Secretary did have authority to find what the rate properly should have been during that period even though he could not prescribe it or give it effect by any order, and this Court held

that the district court should utilize the Secretary's determination of that question and dispose of the fund as an excess over such proper rate (307 U. S. at 198):

> A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. *Atlantic Coast Line R. Co.* v. *Florida*, supra, 312-313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him. Cf. *Makler* v. *Eby*, 264 U. S. 32; *Tod* v. *Waldman*, 266 U. S. 113. The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly.

In the *Atlantic Coast Line* case, the amount involved was the excess over previously fixed rates collected by a carrier under an order of the Interstate Commerce Commission prescribing increased rates during the period between the effective date of the order and the order of the court on review setting the increase aside for procedural defects. Subsequently, by a valid order, the increase became effective but again, as in the *Morgan* case, the administrative agency had no authority to prescribe the rate for the interim period. This Court treated the subsequent valid administrative increase in rates upon the basis of the facts prevailing during the interim period as a sufficient basis for court determination that the equities of the case required refusal of restitution (295 U. S. 316–317):

> * * * A complex of colorable right and procedural mistake has brought about a situation in which the equities of the carrier, if they are not protected by the court, will be unprotected altogether. The rates now recognized as just are not a fabrication of the judges. They have not been fixed by a court to take effect thereafter. They are the rates prescribed for the future by the appointed administrative agency, and that on two occasions, after scrutiny and study of injustice suffered in the past. * * * A situation so unique is a summons to a court of equity to mould its plas-

fic remedies in adaptation to the instant need.

> We think the claim for restitution should have been rejected altogether. In thus holding we do not suggest that the determination of the Interstate Commerce Commission as to the rates to be operative thereafter had the force of *res judicata* in respect of past transactions. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 389; *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561, 569. None the less, as the court below conceded, it was entitled to great respect, representing, as it did, the opinion of a body of experts upon matters within the range of their special knowledge and experience. *Illinois Central R. Co.* v. *Interstate Commerce Comm'n*, 206 U. S. 441, 454; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665.

In the present case, the order below distributing the impounded fund among the purchasers for resale would give them an excessive return for the interim period exactly as would a retroactive rate increase for that period. Such an excessive return would be analogous to the awards which were denied in the *Morgan* and *Atlantic Coast Line* cases. It is therefore appropriate for the court which has issued the stay to utilize administrative determinations, if necessary, and on the basis of

those determinations, to dispose of the fund in accordance with equitable principles." Where,

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[11] This requires rejection here, as in the *Atlantic Coast Line* case, of contentions based on *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, denying to the federal judiciary the power to take upon itself the function of a rate-making body charged with legislative duties. As this Court pointed out in the *Atlantic Coast Line* case (295 U. S. 315–316): "The claimants refer to cases in which this court has denied the power of the federal judiciary to take upon itself the functions of a rate-making body, charged with legislative duties. None of the cases cited controls the case at hand. A typical illustration is *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264. Rates prescribed by a state commission for the furnishing of gas were found by a federal court to be below the line of compensation. In the face of that finding the decree refused relief unless the complainant would consent to abide by a new schedule established by the court itself. Upon appeal to this court the condition was annulled. We gave explicit recognition to the power of a court of equity to subject an equitable remedy to equitable terms. We held, however, that full protection could be accorded to seller and consumer if the regulatory Commission were permitted to discharge its proper function of prescribing a just schedule after the unlawful one had fallen. 'In the circumstances there was no occasion for the court to draw upon its extraordinary equity powers to attach any condition to its decree, and the condition which it did attach was an unwarranted intrusion upon the powers of the Commission.' 290 U. S. at p. 273."

Newton v. *Consolidated Gas Co.*, 258 U. S. 165, on which respondents also rely in this phase of the case (Br. for Interstate in opposition, pp. 10, 11, 16; Answer of Southern Natural in No. 109, p. 12; Response of Memphis, p. 7) is similarly inapplicable. The *Newton* case held that the decree of a district court enjoining a rate as confiscatory on condition that the utility should impound the rate collected in excess thereof, could not direct disposition of the impounded fund "in accordance with any subsequently approved rate." The court, this Court held, "should not have attempted, in effect, to sub-

as in this case, there is an unchallenged administrative determination already made (see *infra*, pp. 53–57), or filed rates are properly accorded the same effect as administratively prescribed rates (see *infra*, pp. 39–41), it may be unnecessary for the court to await a further administrative determination.[22]

It was such cooperation between the courts and regulatory agencies "which was devised to unravel the skein" in the *Morgan and Atlantic Coast Line* cases. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620; *American Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422; *Inland Steel Co.* v. *United States*, *supra*; *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 7 (Cardozo, C. J. dissenting). There, "the creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness, have escaped the imprisonment of reason and fairness within mechanical concepts of the common law." *Addison* v. *Holly Hill Co.*, *supra*, at 620. Such a solution of the problem presented by this case

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ject the Company for an indefinite period to some unknown rate to be proclaimed in the future upon consideration of conditions then prevailing" (258 U. S. at 177). Thus the nub of the Court's holding was that the condition imposed by the district court as a condition of the injunction involved an abuse of discretion.

[22] In the court below, the Commission and the Illinois Commerce Commission offered their assistance to the court in investigating into the immediate purchasers' claims. Cf. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618–619.

would avoid repetition of the "mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice." *Morgan* case at 191. "Court and agency are the means adopted to attain the prescribed end * * *. * * * neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." *Morgan* case at 191.

B. THE DOCTRINE OF THE CENTRAL STATES CASE DEFEATS THE OBJECTIVES OF THE NATURAL GAS ACT FOR THE PERIOD OF JUDICIAL REVIEW.

Under the interpretation put upon the *Central States* case by the Court below, whenever a Commission rate reduction is stayed pending judicial review, the funds accumulated during the period of review (four years in the present case) must be distributed to the "natural-gas company's" immediate purchasers, which claim their share of the fund. For that period, we submit, the Natural Gas Act would be nullified so far as financial benefits to ultimate consumers are concerned. Not only would the ultimate consumers be deprived *pro tanto* of the protection from "exploitation at the hands of natural gas companies" which protection was "the primary aim" of the Natural Gas Act (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610, 612; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690; H. Rep.

No. 709, 75th Cong., 1st sess., p. 2), but the Natural Gas Act would be perverted into a law which "exploits consumers and unjustly enriches distributing companies" and natural gas companies (cf. *Central States* case at 146, 151 (dissenting opinion)).

1. *The doctrine of the Central States case discriminates against ultimate consumers.*—The instant case illustrates graphically how distribution of the impounded fund to the immediate purchasers frustrates the purposes of the Natural Gas Act. As we show, *infra*, pp. 53–57, the immediate purchasers here had earned a reasonable return during the impoundment period. Moreover, once the fund is distributed to them, no one is in a position to compel them to disgorge any portion thereof. *Infra*, pp. 59–61. In these circumstances, if the fund is distributed to the immediate purchasers, they will receive the entire fund of nearly $3,000,000 which was accumulated during the four years that the rate reduction was stayed, and no part of it will reach the ultimate consumers for whose benefit the reduction had been ordered. Thus, the ultimate consumers are deprived of any benefit from the rate reduction for that period and *pro tanto* denied the protection from exploitation which the Natural Gas Act was intended to provide.

This is not an isolated example of the perversion of the Natural Gas Act caused by the

Central States case. Prior to the *Central States* decision, it was almost uniformly agreed that the ultimate consumers of the gas were entitled to the impounded fund. That was the reason why all the immediate purchasers, except the petitioner in the *Central States* case, disclaimed their allocable share in 99½% of a total fund of about 6½ million dollars in favor of the ultimate consumers. "Most of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers, not to enrich them." *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 134 F. 2d 263, 265 (C. C. A. 7).[13] That was the reason which influenced the courts of appeal in 1942 in *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission* (No. 296, October Term 1944, R. XVI, 7182);[14] in *Colorado Interstate Co.* v. *Federal*

[13] When the United Gas costs were reduced by Interstate's compliance with the Commission's order here involved, in so far as it pertained to gas sold to United Gas for resale in the New Orleans area, United Gas voluntarily lowered its rates to pass on the entire amount of this reduction to local distributing companies which, in turn, passed it on to ultimate consumers. *Interstate Natural Gas Co., Inc., La. Public Service Commission* v. *Interstate Natural Gas Co., Inc., et al.*, F. P. C. Docket Nos. G-149 and G-132, Order of June 26, 1944.

[14] The Panhandle order required payment of the fund to the custodian "to be held by him for the benefit of the ultimate consumers or of petitioners as in this litigation may be determined entitled thereto." (R. XVI, 7182). See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 154 F. 2d 969 (C. C. A. 8), certiorari denied, 329 U. S. 761.

Power Commission (No. 379, October Term 1944, R. I, 118); in *Colorado-Wyoming Gas Co.* v. *Federal Power Commission* (No. 575, October Term 1944, R. I, 22); and the court of appeals, in the present case, in 1943 (R. 2), in its stay of the Commission's rate reduction order, specifically first to name the ultimate consumers of gas as the persons equitably entitled to share in the fund about to be accumulated.

Since the *Central States* decision, the percentage of claiming immediate purchasers has increased. In that case, only one immediate purchaser claimed its allocable share of ½% of the fund. In the refund stemming out of *Cities Service Gas Co.* v. *Federal Power Commission*, 155 F. 2d 694 (C. C. A. 10), certiorari denied, 329 U. S. 773, 16 of the 44 companies claimed all or a portion of their allocable share, or about 4% of the $25,000,000 fund involved.[15] In the refund proceeding following *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635, 23 out of a total of 56 companies claimed their allocable share, about 20% of the $24,000,000 fund there accumulated. In the instant case, the *Central States* case is being exploited to the utmost. The immediate purchasers are claiming the entire fund. The claim now asserted by Southern Natural contrasts sharply with its voluntary pass-

[15] Over 80% of the fund in the Cities Service refund was allocable to the purchases of one distributing company.

ing on of the United Gas reduction in 1943, at a time when the order here involved was already stayed. *Infra*, p. 54.

The increase in the percentage of claimants is in large measure due to the fact that the purchaser for resale usually is in a position to keep the portion of the fund distributed to it. Although in the *Central States* case, this Court required that the way be left open for the ultimate consumers to utilize the remedies, if any, provided by local law, no such proceeding has been brought. We are informed that in the *Panhandle* case, where the court of appeals, in distributing allocable shares of 23 claiming immediate purchasers, required these distributors to undertake to satisfy any judgment obtained in such a proceeding, only one suit has to date been brought by the purchasers' customers against it. Only one such suit appears to have been brought as the result of the *Cities Service* refund proceeding.

The reason for the absence of further action by the ultimate consumers is that typically, as in the present case (see *infra*, pp. 59–61), no remedy is available. The impounded funds, if paid to the immediate purchasers, cannot be reached as an element in fixing future rates, for they fall in the category of additional past profits (as a retroactive reduction in the cost of gas purchased) which may not be considered in fixing future rates. *Knoxville* v. *Knoxville Water Co.*, 212 U.

S. 1, 14; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 395; *Board of Public Utility Commissioners* v. *New York Tel. Co.*, 271 U. S. 23, 32; *Los Angeles Gas Co.* v. *Railroad Commission*, 289 U. S. 287, 313.

Nor in most instances could the fund be reached by way of a reparation proceeding either before the regulatory agency or in the courts. As to the regulatory agencies, they are typically without reparation power. See, *e. g.*, *T. R. Miller Co.* v. *Louisville & Nashville R. Co.*, 207 Ala. 253; *City of Atlanta* v. *Atlanta Gas-Light Co.*, 149 Ga. 405; *Texas & Pac. R. Co.* v. *Railroad Commission*, 137 La. 1059; *State ex rel. Railroad* v. *Public Service Commission*, 303 Mo. 212, 218; *Re Arkansas Power & Light Co.*, 46 P. U. R. (N. S.) 226 (Ark. Com.); cf. *Dunlap Lumber Co.* v. *Nashville etc. R. Co.*, 129 Tenn. (2 Thomp.) 163. Even where they do have reparation power, regulatory agencies are unable to award reparation where the rates attacked as unreasonable have been prescribed by them in the exercise of their quasi-legislative function. *State ex rel. Boynton* v. *Public Service Commission*, 135 Kan. 491; *Northern Pac. Ry. Co.* v. *Dept. of Public Works*, 136 Wash. 389; cf. *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U. S. 370, 389. Where a common law reparation proceeding is instituted in the courts,[16]

[16] In several states, the courts have held that the common law right to sue for reparation was abolished by the change to commission supervision. See, *e. g.*, *Graham Ice Co.* v.

the courts are similarly held to be bound by an administratively prescribed rate and barred from investigating into its reasonableness. *Boynton* v. *Public Service Commission, supra.* And in many states, the bar to judicial inquiry into the reasonableness of the rate attacked is extended to the situation where the regulatory agency has not affirmatively prescribed the attacked rate but merely accepted it for filing whereby, it is held, the rate becomes a "commission rate" in contradistinction to a "carrier rate." *T. R. Miller Mill Co.* v. *Louisville & Nashville R. Co.*, 207 Ala. 253; *E. L. Young Heading Co.* v. *Payne*, 127 Miss. 48; *Suburban Water Co.* v. *Borough of Oakmont*, 268 Pa. 243; *Mathieson Alkali Works* v. *Norfolk & W. Ry.*, 147 Va. 426; *Missouri-Kansas & T. R. Co. of Texas* v. *Railroad Commission*, 3 S. W. 2d 489 (Tex. Civ. App.); cf. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. 2d 443, 446 (C. C. A. 5) (Hutcheson, J., concurring). The bar to judicial inquiry which is present in jurisdictions in which the regulatory agency has no reparation power leaves ultimate consumers wholly without remedy. *Purcell* v. *New York Central*

Chicago, M. & St. P. Ry. Co., 153 Wis. 145; *Gurney Heater Mfg. Co.* v. *New York, N. H. & H. Ry. Co.*, 264 Mass. 427; *Crook* v. *Baltimore & Ohio Rd. Co.*, 32 Ohio App. 263; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 212 Cal. 370; *Woodrich* v. *Northern Pac. Co.*, 71 F. 2d 732 (C. C. A. 8); cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. See, also, Note, *The Shipper's Right to Recover for Unreasonable Railroad Rates*, 21 Iowa L. Rev. 751, 758.

R. R. Co., 268 N. Y. 164; *Utah-Idaho Cent. Ry. Co.* v. *Public Utilities Commission*, 64 Utah 54; cf. *Charleston Apartments Corp.* v. *Appalachian Electric Power Co.*, 118 W. Va. 694; Hardman, *The Finality of the Filed Rate in West Virginia*, 49 W. Va. L. Q. 143, 150 *et seq.*

2. *The doctrine of the Central States case encourages frivolous litigation.*—In addition, a requirement that the accumulated fund must be turned over to the immediate purchasers, offers, we submit, a powerful incentive not only to seek judicial review of a Commission rate reduction order, regardless of the frivolity of the grounds, but to prolong the litigation as much as possible where, as here, the "natural-gas company," whose rates are ordered reduced, and one or more of its immediate purchasers are subsidiaries in a single operating system. In the present case, for example, Interstate was affiliated with Mississippi, when the petition for review was filed in the court of appeals. The Standard Oil Company (N. J.) owned 22.5% of Mississippi's stock as well as 53.97% of Interstate's stock, and Mr. Frank H. Lerch, Jr., was president of both companies. See *Interstate Natural Gas Co.* v. *Federal Power Commission*, No. 733, October Term, 1946, R. I., 241, 242, 245, 247, 250, 254; II, 706, 723.

Such affiliation is not uncommon in the natural gas industry. The Commission recently had occasion to discuss such affiliation in another connection and it there pointed out (*Re Michigan-*

Wisconsin Pipe Line Co., 67 PUR (NS) 427, 458, fn. 18):

> * * * the Peoples Gas Light & Coke Company which serves Chicago, Illinois, and controls Chicago District Pipeline Company, its immediate supplier, and has a substantial interest in Natural Gas Pipeline Company of America and Texoma Natural Gas Company. United Gas Corporation controls United Gas Pipe Line Company and Union Producing Company, the latter supplying in part the requirements of United Gas Pipe Line Company which company in turn supplies gas to United Gas Corporation. Lone Star Gas Company which furnishes natural gas to many communities in Texas and Oklahoma and operates its own extensive transmission system receives a large portion of its gas supply from Lone Star Producing Company. Cities Service Gas Company, which operates an extensive pipe-line network, is the source of supply to its affiliated distribution companies, Kansas City Gas Company, Wyandotte County Gas Company and Gas Service Company. Southern California Gas Company and Southern Counties Gas Company which distribute gas in a large area of southern California, operate numerous pipe lines extending to producing fields and also purchase a considerable portion of their gas supply in their distribution territory from their parent company, Pacific Lighting Corporation, which transports such gas from the gas produc-

> ing fields of California. Southern Natural Gas Company which operates an extensive transmission system is the sole source of gas supply to a number of affiliated distributing companies in Mississippi and Alabama. In the Appalachian area the common practice is to have production, transmission, and distribution operations integrated through common financial control as in the case of Columbia Gas & Electric System, Consolidated Natural Gas Company system, Standard Gas & Electric Company system and National Fuel Gas Company system.[17]

Where affiliation is present, as it was in the present case between Interstate and Mississippi when the case was still before the Commission, a requirement that the impounded fund be distributed to immediate purchasers operates to retain that portion of the reduction within the holding company system, the sole consequence of the rate reduction order being merely to shift the amount of reduction from the treasury of one subsidiary to that of another.

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[17] This enumeration is not exhaustive. Examination of the 1946 annual reports filed with the Commission by "natural-gas companies" subject to its jurisdiction reveals several additional instances of affiliation between local distributing companies and the "natural-gas companies" which supply them with gas. For example, Southern Natural, one of the immediate purchasers here involved is a subsidiary of Federal Water and Gas Corporation which also owns Alabama Gas Co., Birmingham Gas Company, and Mississippi Gas Company, local distributing companies in Mississippi and Alabama, supplied by Southern Natural. United Gas, another

C. THIS COURT SHOULD OVERRULE THE *CENTRAL STATES* CASE

Since, as we have shown, the *Central States* decision is unsound, that case should be overruled. "The Court bows to the lesson of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Colorado Oil & Gas Co.*, 285 U. S. 393, 407–408 (Brandeis J. dissenting).

Inasmuch as the holding in the *Central States* case was formulated in terms of the division of powers between state and federal governments as well as the separation of the judicial from the

of the immediate purchasers here is a subsidiary of the Electric Power & Light Corporation holding company system, which also includes The Louisiana Power & Light Company, United Gas Corporation, New Orleans Public Service, Inc., and Mississippi Power & Light Company, distributors of natural gas in Louisiana, Mississippi, and Texas. Hope Natural Gas Company, a "natural gas company," is a subsidiary of Consolidated Natural Gas Company, which also controls The East Ohio Gas Company and The River Gas Company, companies engaged in the local distribution of gas in Ohio. Cincinnati Gas & Electric Company, a "natural-gas company," owns 95.4% of the stock of Union Light and Power Company, a local distributing company in Kentucky. Public Service Company of Colorado, a local distributing company, is the parent of Colorado-Wyoming Gas Company, a "natural-gas company." North Penn Gas Company, a "natural-gas company," is a subsidiary of Pennsylvania Gas and Electric Corporation, which also owns 100% of the stock in Allegany Gas Company, Alum Rock Gas Company, and Dempseytown Gas Company, local distributing companies in New York and Pennsylvania.

legislative power, i. e., that a federal court has no power to fix or adjust the rates of a local distributing company, "that being a legislative function of the State of Iowa," there is serious question whether the correction could be undertaken by legislative action. The language used by the Court, denying the power "*at least* in the absence of federal legislation *purporting* to confer such power" (324 U. S. at 143, emphasis supplied), certainly carried with it no suggestion that the validity of corrective legislation would be indubitable. This Court alone, under our system of Government, is plainly empowered to correct its former error, if such it was. *Burnet* v. *Colorado Oil & Gas Co.*, *supra*, at 407, and cases there cited; *Murdock* v. *Pennsylvania*, 319 U. S. 105, compare the situation under the English system where the Parliament is free to correct any judicial error (*Burnet* v. *Colorado Oil & Gas Co.*, *supra*, at 410; cf. *Helvering* v. *Hallock*, 309 U. S. 106, 121–122).

Even if the *Central States* case could be corrected by legislative action, this Court is not thereby debarred from itself undertaking correction (*Burnet* v. *Colorado Oil & Gas Co.*, *supra* at 406, fn. 1; *Helvering* v. *Hallock*, 309 U. S. 106), particularly where, as here, the principle involved, relating to the powers of a federal court sitting as a court of equity, is singularly a judicial and not a legislative doctrine and hence peculiarly

for this Court to correct. Cf. *Girouard* v. *United States*, 328 U. S. 61. Moreover, there has been no intervening action of Congress affirmatively indicating approval of the *Central States* decision to prevent judicial correction thereof. No amendments to the Natural Gas Act dealing with this situation have been proposed.[18] Unlike the situation presented in *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, Congress has been silent as to the question here involved. "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." *Helvering* v. *Hallock*, 309 U. S. 106, 119; *Girouard* v. *United States*, 328 U. S. 61, 69; *Cleveland* v. *United States*, 329 U. S. 14, 22–23 (Rutledge, J., concurring).[19] Nor have substantial interests established themselves "by the accretion of time and the response of affairs" around the *Central States* decision. *Helvering* v. *Hallock*, *supra* at 119.

[18] Doubts as to the power of Congress to act have played a part in the failure of the Commission to seek legislative relief.

[19] "* * * There are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See *Moore* v. *Cleveland Ry. Co.*, 108 F. 2d 656, 660. At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors, see *Girouard* v. *United States*, *supra*, at 69, as they ought to do when experience has confirmed or demonstrated the errors' existence."

The *Central States* decision comes into play only when a rate reduction order has been stayed and at the present, no Commission rate reduction order is being stayed. In the present case, the stay, when originally entered, contemplated that the ultimate consumers would primarily be entitled to the fund (*supra*, p. 5), and the record does not disclose that the immediate purchasers had taken any action in reliance on the *Central States* case during the period that the Commission's order was being reviewed. Hence, setting *Central States* aside would result only in disappointment, not in financial loss. Even if one of the immediate purchasers here had taken such action, the interest arising as a result thereof would, we submit, not be of sufficient substance to warrant retaining the doctrine of that case.[20]

[20] Experience in making distribution to ultimate consumers where the purchasers for resale have disclaimed, indicates that the administrative problem of distributing the fund to the ultimate consumers is not unduly burdensome, and, despite the fact that ultimate consumers die or move without leaving a forwarding address, distribution of more than 90% of the fund is typically made. Moreover, with the acquisition of experience in such matters, the distribution does not consume an unreasonable period of time. In the Cities Service refund, the most recent in point of time, most of the fund of more than $23,000,000 was distributed to over 700,000 customers in less than a year. In regard to the procedure adopted in making this distribution, the Master appointed by the court of appeals stated in response to an inquiry:

"I was appointed as Master on July 3, 1947. My Report, with proposed Plan of Distribution and Refund, was filed with the Court on August 4, 1947. Notice was thereupon given by mail and by publication to all parties concerned that

II

The Present Case Is Distinguishable From the *Central States* Case

We have urged in Point I that the *Central States* case should be reexamined and overruled. We have pressed this point in this case only after long and careful deliberation. Our decision to urge that *Central States* should not be followed was reached because in no other way can a distribution to the ultimate consumers be assured.

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a hearing to consider the proposed Plan, etc., would be held at Kansas City, Kansas, on August 19, 1947. At that time the Report was approved and the Plan of Distribution and Refund as submitted was approved, adopted and incorporated in the Order of the Court of August 19, 1947. Contracts with the distributors involved and with Remington Rand, Inc., for the preparation of lists of eligible customers and the preparation of refund checks, as well as for all supplies necessary in the refunding operation, were promptly consummated. In the meantime, closing agreements and tax clearances with the Internal Revenue Department and the Revenue Departments of the states of Kansas, Oklahoma, and Missouri were secured, relieving the distributors disclaiming an interest in the fund and agreeing to distribution, of any possible tax liability thereon as a result of the distribution, the closing agreement on behalf of the federal government covering all of the companies involved and making application therefor, being finally approved by the Secretary of the Treasury on November 24, 1947. Lists of eligible customers from the various distributors were received during October and November, and the first refund checks were issued on December 4. The issuance continued and was completed on June 1, 1948. In the meantime, and as the 90-day validity period of the checks previously issued expired, appropriate notices to gas customers were published in the various towns and communities advising of the 90-day

In this Point, we urge that the *Central States* case is distinguishable from the present case, and that, even if not overruled, it should not be held to be controlling here so as to require the distribution of the fund to the immediate purchasers. Should the Court adopt this approach, and hold that the impounded fund need not be distributed to the immediate purchasers, a substantial portion of the fund clearly will reach the ultimate consumers, even within the confines of the *Central States* case.[21] But what the ultimate consumers

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period within which to make claims where refund checks had not been received or had been received and lost or destroyed and not cashed within the validity period, etc. Processing of claims concerning refund checks was carried out from the time of the first issuance of checks, enabling persons who had an interest therein by reason of the death of the original customer to receive reasonably prompt payment of the refund. Processing of claims filed as a result of the published notices was carried on at the same time, every effort being made to issue final checks shortly after the expiration of the 90-day claim period. The only communities remaining in which final checks are to be issued where the claim period has not expired are Kansas City, Kansas, Merriam, Kansas, Kansas City, Mo., Independence, Mo., Arkansas City, Kansas, Joplin, Mo., and what is known as Joplin Rural Main Line Customers, being customers scattered around Joplin, Mo., and served by the main pipe line system. These claims are being processed at the present time, and it is hoped and anticipated that all of them can be cleared up before the first of the year."

[21] The West Tennessee Gas Company, one of the distributing companies purchasing gas from Memphis, whose allocable share of the fund is at least $24,466 (R. 30), voluntarily filed a disclaimer of its allocable share (R. 86–87). The Laclede Gas Light Company, which also includes the merged St. Louis County Gas Company and the Missouri Natural

will receive will only be by grace of the distributing companies. For that reason, our contention that *Central States* should be overruled must be our primary one.

A. THE CLAIMS OF THE IMMEDIATE PURCHASERS HERE DO NOT RAISE ANY QUESTIONS DETERMINABLE ONLY BY A STATE AGENCY

In the *Central States* case, the immediate purchaser claiming its allocable share of the fund was a local distributing company, whose rates were subject to local regulation, and its claim fundamentally was based on the alleged inadequacy of its rates during the impoundment period. This Court in the *Central States* case, treated that question as being determinable only by a state agency. In this case, the immediate purchasers are claiming the fund as a matter of right, and not because their return during the impounding period was unreasonably low. But even if the immediate purchasers did assert that their rates were unreasonably low, the issue would not be one which a state agency could determine. Here, the

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Gas Company, would also disclaim, in favor of their ultimate consumers, their shares totalling nearly $400,000 (R. 30, 93–94). The Illinois Power Company and Union Electric Power Company have also stated their intention to disclaim all interest in about $60,000 (R. 30) of the fund (Pet. in No. 212, p. 13, fn. 4). Experience in other similar distribution proceedings, where the percentage of disclaimers, although decreasing, has until this case usually been very high, also indicates that other distributing companies would probably also disclaim.

immediate purchasers are not local distributing companies but rather are themselves "natural-gas companies" engaged in transportation or sale at wholesale of natural gas in interstate commerce. These activities, unlike those involved in the *Central States* cases are subject to regulation only by the Commission.[22] *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498. These activities are not local in character and, even in the absence of Congressional action, are not subject to state regulation. *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689; cf. *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83. It was the very absence of state regulatory power in this field that impelled the Congress to enact the Natural Gas Act in 1938. As this Court noted in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S.

[22] The immediate purchasers' sales to industrial consumers are, of course, not subject to the Commission's jurisdiction. See Section 1 (b) of the Natural Gas Act, 15 U. S. C. 717 (b); *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U. S. 581. Since this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, the Illinois Commerce Commission (petitioner in No. 212) and the Public Service Commission of Missouri (petitioner in No. 188) have initiated proceedings looking toward the assertion of jurisdiction over these industrial sales. We do not suggest that the distinctions urged in the text are applicable to any portion of the impounded fund allocable to these industrial sales.

682, 690, the "basic purpose" of Congress in passing the Natural Gas Act was to "occupy this field in which [this] Court had held that the States may not act." See H. Rep. No. 709, 75th Cong., 1st sess., p. 2; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610. In these circumstances, the assertion of a claim by Interstate's immediate purchasers raises questions not determinable by a state agency, and an important if not controlling factor in the *Central States* case is absent.

B. THE CLAIMS OF THE IMMEDIATE PURCHASERS DO NOT INVOLVE RATE MAKING.

In the *Central States* case, the determination of the distributing company's claim that its rate of return during the impoundment period was unreasonably low, was held to involve the legislative function of rate making. In the present case, the claim of immediate purchasers is not so predicated; instead they assert that they are entitled to the portion of fund allocable to their purchasers solely on the ground that they are the immediate purchasers from Interstate (R. 42–46, 49–53, 65, 71–75, 100). These claims so formulated obviously do not depend on the level of their rates for resale of the gas or the return produced thereby, and hence do not involve any issue as to the reasonableness of rates during the impoundment period. Therefore, no question involving the legislative function of rate making is here presented.

Moreover, even if the immediate purchasers had based their claim on the alleged inadequacy of their return during the impoundment period, the court below would not have been required itself to investigate the validity of that claim, but instead could have utilized the findings of the Commission, which, immediately before the issuance of the Interstate rate order and while it was suspended during the four years pending judicial review, investigated into the reasonableness of the wholesale interstate rates charged by the immediate purchasers. In so investigating the immediate purchasers' rates with respect to the period before the affirmance of the Interstate rate order, the Commission gave no effect to the reduction in the cost of purchased gas to each of the companies involved which would result when and if that order was sustained. Yet, in each case, as set out below, the immediate purchasers' rates were reduced to reasonable levels either voluntarily or pursuant to order of the Commission.

(1) *Southern Natural:* Southern Natural's rates were adjusted downward to reasonable levels four times during the impoundment period. On June 22, 1943, a few days after its denial of rehearing in the Interstate proceeding, the Commission instituted an investigation into the reasonableness of Southern Natural's rates and charges for the transportation and sale of natural gas subject to its jurisdiction. 3 F. P. C.

1023. While that investigation was pending, Southern Natural, on December 17, 1943, reduced its rates to its customer companies by $175,431 annually, in order to pass on the benefits of the reduction in its costs of purchased gas resulting from the reduction in the rates of another supplier; United Gas. See Commission Order of January 18, 1944. On October 30, 1944, Southern Natural voluntarily reduced rates for "domestic gas to distributing companies for resale by $634,900 annually."[23] See Commission Order of November 28, 1944 (accepting these schedules and noting that all but two of the distributing companies involved intended to pass the reduction on to its customers). Southern Natural's rates were further adjusted on February 15, 1945, by reducing rates for gas resold to Mississippi Power & Light Company's domestic consumers by $14,183, and increasing rates for gas resold to its industrial customers by $6,897. See Commission's order of March 14, 1945. On March 30, 1946, the Commission, as a consequence of its investigation, accepted a stipulation agreed to by Southern Natural, and ordered the Company further to reduce its rates by $1,211,946 per annum as applied to 1944 experience. 5 F. P. C. 427. This reduction did not reflect the further reduction in costs ($146,803 annually) involved in the Interstate proceeding. 5 F. P. C. 662.

[23] Southern Natural simultaneously increased rates for industrial gas by $318,690.

Thus, shortly after the Interstate order was stayed, twice more at intervals thereafter, and finally shortly before the stay terminated, Southern Natural's rates were reduced. Of these four reductions, three were by substantial amounts. Clearly, therefore, Southern Natural could not claim any portion of the Interstate impound on the ground that it had not earned a reasonable return during the impoundment period.

(2) *Mississippi:* The Commission on April 6, 1943, prior to its order against Interstate, instituted an investigation into Mississippi's rates and charges subject to its jurisdiction. 3 F. P. C. 972. After investigation and hearing, the Commission on November 9, 1945, directed Mississippi to reduce its wholesale interstate rates by $945,613 per annum as applied to its 1943 volume of sales. 4 F. P. C. 340. This reduction did not reflect the reduction in cost of purchased gas which would result from the Interstate rate reduction. As to that, the Commission commented (4 F. P. C. at 359):

> The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by $301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the

> court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. * * *

Mississippi sought review of the Commission's order in the Court of Appeals for the District of Columbia. That court, while it sustained the reduction for the most part, remanded the case to the Commission because of insufficient findings with respect to the allocation of certain costs.[1] *Mississippi River Fuel Co.* v. *Federal Power Commission*, 163 F. 2d 433. Upon remand, Mississippi and the Commission entered into a stipulation on May 4, 1948, whereby the Commission was to dismiss its rate proceeding against the company. Mississippi in turn was to reduce its rates by about $850,000 and, in addition, to pass on that portion of the reduction in costs stemming from the Interstate rate order which accrued since January 29, 1946, the date on which the Commission had originally ordered Mississippi to place reduced rates in effect.[2] In this case, the immediate purchaser, Mississippi, clearly earned

[1] If these costs were allocated entirely to regulable business and so reduced the excess earnings on that business by that amount, Mississippi's rates thereon would still have exceeded just and reasonable levels by at least $800,000 per annum.

[2] No express provision was made for that portion of the reductions which accrued prior to January 29, 1946 and presumably it was to be disposed of as the courts should direct.

a reasonable return during the impoundment period, and, in addition, the Commission had explicitly found that the Interstate impound would be "an unearned windfall," *i. e.*, in excess of a reasonable rate of return.

(3) *Memphis*: The Commission, as the result of conferences with Memphis, accepted as of July 26, 1943, only two months after the Interstate order, new rate schedules, which as applied to 1942, reduced Memphis' revenues by about $350,000. 3 F. P. C. 566. The Commission's opinion pointed out that the company's representatives had stated that any future benefit the company might receive by reason of the Interstate order would be passed on to its customers.[*] 3 F. P. C. at 570. In 1946, Memphis filed new schedules increasing its rates by $240,000, for the stated purpose of raising its rate of return to 6½%. F. P. C. Docket No. G–822. Various of its customers protested the increase, and the Commission suspended the new rates pending a public hearing. 5 F. P. C. 946. Memphis, at its request, was subsequently permitted to withdraw its proposed schedules. Order of February 4, 1947. F. P. C. Docket No. G–822. These circumstances indicate, that, presumptively, Memphis' rate of return during the impoundment period was reasonable.[†]

[*] In the court below, the company disputed the correctness of that statement.

[†] Since United Gas, the fourth immediate purchaser here involved, intends to pass on its share of the fund to Memphis.

Thus, the determination of the claims of the immediate purchasers here would not, as it might in the *Central States* case, have involved the passing on the adequacy of their return during the impoundment period. Even if there had been a legislative function involved in passing on the reasonableness of the immediate purchasers' rates during that period, it would already have been performed by the Commission, the agency empowered to make these determinations. There, accordingly, were already available findings as to the reasonableness of the immediate purchasers' rates for the court's use in passing on their claims.[7] These findings indicated that the immediate purchasers earned a reasonable return during the impoundment period and, hence, that the formula used by the Commission in determining the rates of these purchasing companies necessarily would have resulted in additional reductions in their rates but for the stay in the *Interstate* case. Cf. *Mississippi River Fuel Corp.*, 4 F. P. C. 340, 359, 363.

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for whose account the purchases were made (*supra*, pp. 5–6), and not to retain any portion thereof to itself, its experience during the impoundment period is immaterial.

[7] In the absence of Commission findings as to the reasonableness of the immediate purchasers' rates during the impoundment period, the court could have held the fund pending findings by the Commission as to the reasonableness of these rates. See *supra*, pp. 28–33.

C. NO OTHER METHOD OF RESISTING THE CLAIM OF THE IMMEDIATE PURCHASERS IS AVAILABLE

In the *Central States* case, the Court apparently thought that there might be a method provided under the laws of the State of Iowa whereby the rights of the ultimate consumers to the fund *vis-a-vis* the local distributing company could be adjudicated (324 U. S. at 145, 146) and, hence, that its disposition of the cause did not necessarily finally determine any claims to the fund. In the present case, the court below also indicated that it did not intend its disposition of the fund to be final, and provided for the preservation "of the rights, if any, of ultimate consumers or others to hold said companies to account in respect" of the accumulated fund.

But the disposition of the fund by the court below here is final. The rights which the court below preserved to the ultimate consumers are nominal only, for in this case, there clearly is no method available whereby the rights of the immediate purchasers to the fund can be attacked.[29] No power resides in any person or tribunal to compel these companies to pass on either to ultimate consumers or to distributing companies any portion of the fund to be contributed to them. There is no privity between these companies and the ultimate consumers as the ultimate consumers purchase from

[29] It should be noted that no further legal proceedings were instituted as the result of the preservation of a similar right in the *Central States* case. See *supra*, p. 38.

the distributing companies. The distributing companies are without legal rights in the premises, since the rates charged them during the impoundment period were legal rates which must be charged all customers. Section 4 (e) of the Natural Gas Act, 15 U. S. C. 717c (e); cf. *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U. S. 370. And the Commission is without power to affect these rates since it is without jurisdiction to fix retroactive rates or issue reparation orders. Section 5 of the Natural Gas Act, 15 U. S. C. 717d; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; cf. *Public Utilities Commission* v. *United Gas Co.*, 317 U. S. 456. For that reason, the Commission may not require the companies to pass on the benefits of the stay order. Similarly, under the decisions of this Court, the state regulatory commissions are powerless to compel these companies to disgorge that portion of the refund attributable to their interstate sales of gas at wholesale. *Public Utilities Commission* v. *United Gas Co.*, *supra*, at 468; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; cf. *Public Utilities Commission* v. *Attleboro Steam Co.*, 273 U. S. 83; *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498. In these circumstances, the consequence in the present case is that unless the court below has power to order the fund distributed to persons other than the immediate purchasers, there is no way in which these immediate purchasers can be prevented from retaining the fund distributed to them, which, in

light of the facts in this case, is clearly an undeserved windfall.

D. THE TERMS OF THE STAY ORDERS INVOLVED ARE DIFFERENT

In the *Central States* case, the Court apparently regarded the terms of the stay order as one of the important background factors to be considered. There, the stay order provided for the filing of a bond to secure the refund to the purchasers at wholesale, i. e., the immediate purchasers to whom this Court subsequently found the money should be distributed. In contrast, the order here involved recognized that the ultimate consumers had a fundamental claim in the impounded fund, and the court, when it entered the stay, apparently intended to distribute the fund to the ultimate consumers, barring unforeseen contingencies. It provided (R. 2) that the fund should be returned to "such ultimate consumers of gas, or other persons to whom the Court shall find the same should be returned, as contemplated by the provisions of the Natural Gas Act," and further it reserved to itself full jurisdiction to cancel or modify the order, "to protect or to promote the rights and interests * * * of the ultimate consumers or other parties financially interested in the impounded funds." If the terms of the stay order are to be accorded any weight in determining whether the court could distribute the fund to the persons

other than the immediate purchaser, then, we submit that, as opposed to the stay order in the *Central States* case, the stay order here involved clearly contemplated that the impounded fund was not necessarily to be distributed to the immediate purchasers.

CONCLUSION

It is respectfully submitted that the judgment below is erroneous and should, accordingly, be reversed.

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APPENDIX

The Natural Gas Act of 1938, (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part as follows:

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

SECTION 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in

a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon

the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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